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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 512

PARAMOUNT FILM DISTRIBUTING CORPORATION, PARAMOUNT PICTURES, INC. (In Dissolution), PARAMOUNT PICTURES CORPORATION, WARNER BROS. PICTURES, INC. (In Dissolution), WARNER BROS. PICTURES, INC. (Delaware), WARNER BROS. DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION (In Dissolution), TWENTIETH CENTURY-FOX FILM CORPORATION (Delaware), LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., RKO PICTURES CORPORATION, COMERFORD THEATRES, INC., COMERFORD PUBLIX THEATRES CORP., RKO-KEITH-ORPHEUM THEATRES, INC., RKO THEATRES CORPORATION, STANLEY WARNER MANAGEMENT CORPORATION, STANLEY WARNER CORPORATION, FABIAN THEATRES CORP. and COLUMBIA PICTURES CORPORATION,

Petitioners,

v.

AUSTIN THEATRE, INC., ARNOLD MALKAN, J. ROBERT ELLNER and MALKAN & ELLNER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 9, 1955.

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OCTOBER TERM, 1955

PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.*,
Petitioners,

vs.

AUSTIN THEATRE, INC., ARNOLD MALKAN, J. ROBERT ELLNER AND MALKAN & ELLNER.
Respondents.

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit. That judgment, affirmed an order of the United States District Court for the Southern District of New York that Arnold Malkan, J. Robert Ellner and Malkan & Ellner were qualified to act as attorneys for Austin Theatre, Inc., the plaintiff, in this action.

The Court of Appeals held that, although said attorneys were disqualified in a companion case, *Laskey* v. *Warner, et al.*, they were not disqualified in this case despite the clear inference that they possess confidential information concerning certain defendants which is directly relevant to the issues raised by the complaints in both actions.

Opinions Below

The opinion of the District Court (123a-135a)* is reported in 130 F. Supp. 514 and is printed in the Appendix hereto, infra, pp. 20-32.

The majority and dissenting opinions of the Court of Appeals (91b-113b) are reported in 224 F. 2d 824 and are printed in the Appendix hereto, infra, pp. 33-52.

The Court of Appeals denied rehearing without opinion.

Jurisdiction

The judgment of the Court of Appeals was entered July 13, 1955 (App. 53). Rehearing was denied on September 6, 1955.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code [28 U. S. C. § 1254(1)].

Questions Presented

Where an attorney, Malkan, forms a partnership with an attorney, Isacson, who had received confidential information from motion picture companies while representing them in antitrust cases, and the firm of Malkan & Isacson,

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*References are as follows:

"R"—to the pages of the original papers in the Court of Appeals;

"App"—to the appendix of this petition;

"a" following a page number—to the respondents' printed appendix in the Court of Appeals in *Laskey*;

"b" following a page number—to petitioners' printed appendix in the Court of Appeals;

"Rep"—to the Special Master's Report in *Fisher*.

until disqualified, held out such confidential information as "bait" in soliciting theatres to bring treble damage actions against such motion picture companies through that firm, and commenced at least seven such treble damage actions:

1. May Malkan, simply by dissolving the disqualified firm of Malkan & Isacson, represent a new treble damage plaintiff in an action against such motion picture companies in which the confidential information would be material and relevant?

2. May Malkan, simply by dissolving the disqualified firm of Malkan & Isacson, avoid the effect of a stipulation in which Malkan & Isacson agreed that disqualification in the action in which they stipulated would be controlling in like antitrust actions pending, or to be commenced, against the stipulating defendants?

Rules and Regulations Involved

Rules of the United States District Courts for the Southern and Eastern Districts of New York (effective March 1, 1952, 16 F. R. S. 906, 908) provide in pertinent part:

> "RULE 5: DISCIPLINE OF ATTORNEYS.
>
> ". . .
>
> "(c) Professional misconduct shall include . . . a failure to abide by the provisions of the Canons of Ethics of the American Bar Association or of the New York State Bar Association."

The Canons of Ethics of the American Bar Association provide in pertinent part:

"Canon 6. It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

"Canon 37. It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

Statement

This is a private antitrust action commenced in the Southern District of New York on November 6, 1954, on behalf of plaintiff by Malkan & Ellner, a law firm composed of Arnold Malkan and J. Robert Ellner, against 58 defendants, all of whom are engaged in the motion picture

business. On the same day Malkan & Ellner brought a similar antitrust action against substantially the same defendants also in the Southern District, entitled *Laskey Bros. of West Virginia, Inc.* v. *Warner Bros. Pictures, Inc. (In Dissolution), et al.* Within seventeen days thereafter, on November 23, 1954, plaintiff in each action moved for an order that Malkan & Ellner was qualified to represent it in its action, and thereafter defendants cross-moved for an order disqualifying the firm of Malkan & Ellner and the members thereof (16a, 20a). District Judge Archie O. Dawson, in an opinion filed March 29, 1955, concluded that these attorneys were disqualified in the *Laskey* action but were qualified in this *(Austin)* action (App. 20-32). Judge Dawson disqualified Malkan & Ellner and the members thereof in the *Laskey* action because plaintiff Laskey was a client of the disqualified predecessor firm of Malkan & Isacson before dissolution of that firm, but he refused to disqualify in the *Austin* action only because that plaintiff engaged Malkan for the first time two months after the dissolution of the disqualified firm of Malkan & Isacson. The Court of Appeals unanimously affirmed Judge Dawson's decision in *Laskey** and, with one Judge dissenting, affirmed Judge Dawson's decision in *Austin* (App. 33-52).

The basis of both the disqualification of Malkan in the *Laskey* action and of petitioners' claim that Malkan must also be disqualified in this action is found in disqualification proceedings which took place in another motion picture antitrust action now pending in the Eastern District of New York, entitled *Fisher Studios, Inc., et ano.* v. *Loew's,*

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*During this term of the Court plaintiff Laskey and Arnold Malkan have filed a petition for certiorari to review the *Laskey* decision. Since Ellner is no longer the partner of Malkan, the remainder of this petition will be confined to Malkan.

Inc., et al. Plaintiffs in the *Fisher* action were represented by Malkan & Isacson, the predecessor firm of Malkan & Ellner, and extensive hearings were conducted before a Special Master on the qualification or disqualification of David H. Isacson and the firm of Malkan & Isacson to represent plaintiffs therein. In his Report filed August 19, 1953, the Special Master concluded that Isacson and the firm of Malkan & Isacson were disqualified to represent plaintiffs in that action by reason of (a) confidential information with respect to certain defendants therein gained by Isacson during the period of his employment by the law firm of Sargoy & Stein, which represented many of said defendants, and (b) solicitation engaged in by Isacson and by others on behalf of the firm of Malkan & Isacson holding out to those solicited the possession of confidential information which was used as "bait" in seeking retainers (Rep. 220-221; R. 377-378).

Prior to the formation of the partnership of Malkan & Isacson, Isacson had been associated with the law firm of Sargoy & Stein from November, 1946 to March, 1951 (Rep. 31; R. 186). Sargoy & Stein and its predecessors have for many years acted as special counsel for numerous motion picture companies, including many of the companies which are defendants in *Fisher, Laskey* and *Austin* (Rep. 10-11; R. 166-167). It was at Sargoy & Stein that defendants' confidential and privileged information came to Isacson. With respect to Isacson's claim that he gained no such confidential information, the Special Master found:

> "The claim is utterly without foundation in the evidence, as has already been abundantly shown. The record demonstrates that he was regularly employed in important litigation involving antitrust

aspects in a law office which was constantly gathering, classifying, and analyzing a great mass of highly confidential data relating to the motion picture industry, to all of which Mr. Isacson had access and much of which he actually saw and used.

"Had Mr. Isacson been associated with an office which had numerous clients of all types, and had he been only occasionally employed on work for a motion picture company, the situation might be different. But Sargoy & Stein, practically speaking, did nothing but motion picture work. Their files contained nothing but data relating to the motion picture industry. If one set out with the avowed purpose of learning all he could about the legal aspects of the motion picture industry on the distribution side, it is hard to imagine an office where he could more readily do so than in Sargoy & Stein. Sargoy & Stein's files contained data not merely concerning one motion picture company or two or three, but virtually the whole industry." (Rep. 190-191; R. 347-348).

There was ample evidence to support the Special Master. He found that during the period of Isacson's employ, Sargoy & Stein participated in the defense of 50 treble damage actions and handled 464 suits against exhibitors for percentage frauds or under-reporting, at least 233 of which had antitrust defenses or counterclaims (Rep. 32, 38, 167; R. 187, 194, 324); that Isacson worked on at least two straight treble damage cases (Rep. 39, 167; R. 195, 324) and that of the 233 percentage fraud or under-reporting cases with antitrust defenses or counterclaims, Isacson initialed or marked memoranda or correspondence in all 233; that he wrote letters or memoranda in 170 of them and participated in the taking of depositions in 72 of them (Rep.

32; R. 188); and that he expressly interrogated on antitrust issues in two cases (Rep. 32, 168-172; R. 188, 325-329), which the Master described as a "representative sampling of the cases involving anti-trust issues in which Mr. Isacson participated" (Rep. 172; R. 329).

After Isacson's dismissal from Sargoy & Stein he unsuccessfully sought legal employment for 16 months and at one point attempted to rejoin Sargoy & Stein (Rep. 63-66; R. 219-222). Finally, Isacson was introduced to Malkan who had an equipped law office in operation and after several months of discussion the law firm of Malkan & Isacson was formed in July, 1952 (Rep. 67; R. 223). The Special Master found that it was indeed strange when a lawyer "who is out of employment for such a long period" could "suddenly blossom forth as an advocate in important antitrust litigation" (Rep. 63; R. 219). In the Master's opinion, "the record shows that this unusual situation is explainable on the basis that Mr. Isacson finally decided to bolster his waning legal fortunes by placing upon the market the confidential information he had acquired while with Sargoy & Stein" (Rep. 63-64; R. 219-220). Mr. Sargoy testified before the Special Master that Mr. Isacson came to him in the summer of 1952 stating "that he had a possibility of tying up with an anti-trust lawyer on a partnership basis, but that the arrangement was predicated upon Mr. Isacson's getting some clients who would undertake antitrust actions against the motion picture distributors" (Rep. 64, 187; R. 220, 344).

At this point the firm of Malkan & Isacson entered upon a deliberate scheme, plan and campaign to peddle confidential information gained by Isacson during his employment by Sargoy & Stein. One basis of the Special Master's

finding that Isacson and the firm of Malkan & Isacson were disqualified was that "Mr. Isacson solicited and stirred up the instant action" (Rep. 221; R. 379). The Special Master concluded that the "bait" in the solicitation campaign on behalf of Malkan & Isacson was Mr. Isacson's special knowledge of confidential data concerning motion picture companies (Rep. 185; R. 342) and "that all that was missing from Mr. Isacson's campaign was a neon sign" (Rep. 186; R. 343). Both the Special Master and District Judge Abruzzo expressly stated that Isacson's confidential information would be of "incalculable value" in preparing and trying a treble damage antitrust case against the motion picture companies (Rep. 25; R. 181, 33b).

At least 65 announcements of the formation of Malkan & Isacson were sent out; some were sent to motion picture exhibitors "who were at that very time engaged in litigation with his [Isacson's] former clients" (Rep. 185; R. 342). Isacson admitted that he had sent, along with these cards, doctored photographs of an article appearing in the "Independent Film Journal", dated August 9, 1952, which stated originally that "David H. Isacson, formerly with the law firm of Sargoy & Stein, became associated with Arnold Malkin, prominent New York attorney". Isacson doctored his photographs so that the word "anti-trust" was added before the word "attorney" and Malkan's name was spelled correctly. The words "Independent Film Journal" were also added in the photograph underneath the article in the newspaper. The Special Master's Report states "that the only reasonable conclusion is that the alteration in the newspaper item was made by Mr. Isacson or under his direction" (Rep. 89; R. 246). In one note to an attorney, who represented independent exhibitors, Isacson wrote that since

his employ with Sargoy & Stein he had "come to see the light and have undertaken to represent exhibitors (the salt of the earth, God bless them)."

Mr. Malkan is linked to the campaign of solicitation not only by his partnership with Isacson but also by solicitation engaged in presumably on his behalf by a former client of his, Mr. William Phillips (33a-35a). The testimony by Mr. William Phillips before the Special Master reveals beyond question that he was engaged in soliciting motion picture antitrust actions on behalf of Malkan. If Malkan did not, in fact, instruct, direct or procure Mr. William Phillips to solicit antitrust actions, Malkan would have taken the witness stand in the *Fisher* disqualification proceedings to deny such facts, but Malkan did not testify.*

The vigor and success of the solicitation campaign conducted by Malkan & Isacson is best shown by the fact that that firm appeared as the attorneys of record or of counsel in a dozen cases involving antitrust claims against motion picture companies (36a-37a).

During the pendency of the *Fisher* disqualification proceedings, the parties by their attorneys and the attorneys representing David H. Isacson and Malkan & Isacson entered into a stipulation, dated February 3, 1953, which was designed to avoid a multiplicity of disqualification proceedings concerning Malkan & Isacson in the numerous triple damage actions then pending in various district courts as well as in future actions. Paragraph 11 of said stipulation provides as follows:

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*The inference is irresistible from the facts and from the failure of Malkan to appear as a witness that Mr. William Phillips was employed or requested by Malkan to solicit anti-trust actions. *Local 167, I. B. T.* v. *United States,* 291 U. S. 293, 298; *Mammoth Oil Co.* v. *United States,* 275 U. S. 13, 52.

> "11. If it shall be finally determined in this action that David H. Isacson and Malkan & Isacson are qualified or disqualified, and if such determination in this proceeding is that such qualification or disqualification embraces 35 mm. antitrust actions, 16 mm. antitrust actions and under-reporting actions, such determination shall be binding upon David H. Isacson, Malkan & Isacson, and the defendants herein, in all cases involving 35 mm. antitrust actions, 16 mm. antitrust actions and under-reporting actions, including those hereinabove mentioned."

Both of the conditions set forth in the above-quoted paragraph 11 were met in the *Fisher* disqualification proceedings. The Special Master found that the disqualification of Malkan & Isacson embraced 35 mm. antitrust actions and this was adopted and confirmed by District Judge Abruzzo (Rep. 220; R. 377). By order filed April 13, 1954, Judge Abruzzo confirmed the Report of the Special Master and disqualified the firm of Malkan & Isacson in the *Fisher* action (39b).

Shortly after Judge Abruzzo disqualified the firm of Malkan & Isacson, that firm was dissolved and Malkan formed his new partnership with Ellner (126a). About two months thereafter the successor firm brought the *Austin* and *Laskey* actions in the Southern District of New York (1b, 2a).

Reasons for Granting the Writ

1. The Bar and public properly look to this Court as the final arbiter of important questions pertaining to legal ethics, particularly where, as here, an attorney's use of

processes of the Federal courts is involved. Cf. *Sacher* v. *United States,* 343 U. S. 1; *Weil* v. *Neary,* 278 U. S. 160; *Cooke* v. *United States,* 267 U. S. 517.

The decision of the Court below in this case has erroneously determined an ethical question of importance to the legal profession, the effect of which is to condone and provide easy escape from grievous unethical conduct by members of the legal profession and to sanction behaviour which would be frowned upon even in the market place. As Judge Ryan, dissenting below, so well put it (App. 50):

> "Partners in a law firm do not dwell in cubicles; they all must observe and respect the confidence and trust a client has reposed in any one of them; they divide the fees and rewards of faithful service; they join in a common acceptance of responsibility to a client; they jointly and severally represent the clients; all are bound to each and every client of the firm by a relationship of trust and confidence, and are bound by such relationship which has at any time existed as to any former client of any one partner. It seems to me that to hold otherwise is to view the practice of the law as a business rather than as a profession. The principles to guide us in fixing the extent of professional obligations of the Bar are not to be looked for in the market place."

There is no logical ground for distinguishing between the *Austin* action and the *Laskey* action. Disqualification in *Laskey* was in reality based upon the premise that confidential information, which Judge Abruzzo stated in connection with the *Fisher* disqualification "would be of incalculable value" in a motion picture antitrust case, was received by Malkan. The incongruity of holding that Malkan is qualified in *Austin* is highlighted by the fact that the issues raised in *Austin* and *Laskey* are the same since

both complaints allege the same nationwide conspiracy in the distribution of motion pictures and discriminatory practices in the granting of "runs" and "clearances" for motion pictures. Every policy reason for disqualifying Malkan in the *Laskey* case applies with equal force in the *Austin* case. In *Austin* the former clients are still the defendants; the issues are substantially the same; and there is the same opportunity for the misuse of confidential information.

The record in this case shows a serious ethical breach, namely, the solicitation by Isacson and others acting on behalf of Malkan & Isacson of antitrust actions against Isacson's former clients and the commencement by the partnership against those former clients of antitrust actions concerning issues with respect to which Isacson had obtained confidential information during his association with Sargoy & Stein. Malkan should not be allowed to escape penalty for his role in this ethical breach by the easy expedient of discarding Isacson and then commencing new actions against Isacson's former clients.

2. The Court below refused to infer that confidential information passed from Isacson to Malkan or that Malkan came into possession thereof during the existence of his partnership with Isacson. Yet the record establishes that Isacson in the 16 months between the time he left the employ of Sargoy & Stein and formed his partnership with Malkan was unable to gain legal employment; that the formation of his partnership with Malkan was premised on his ability to deliver clients who would institute antitrust actions against motion picture companies who were clients of Sargoy & Stein; that Isacson did deliver such clients; that Malkan had never had a motion picture antitrust action prior to his partnership with Isacson; that al-

though Isacson was a motion picture expert he had no experience in instituting antitrust actions; that during the course of the two-year duration of the partnership of Malkan & Isacson, they brought, or appeared as of counsel in, at least seven antitrust actions and also represented defendants in a number of under-reporting actions where antitrust defenses were to be interposed.

When these attorneys pooled their resources and began drafting antitrust complaints against motion picture companies, it seems clear that Isacson must have explained the operations of the former clients of Sargoy & Stein to Malkan and the Special Master in *Fisher* so found. Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association, quoted, *supra,* p. 4, make it unethical for a lawyer to use confidential information gained from a former client against that client. In order to preserve the force of these Canons, it is vital that they be interpreted so as to disqualify not only the attorney who violates them by commencing an action against former clients but also his partner who participates in, and would reap any benefit from, such violation.

In *T. C. Theatre Corp.* v. *Warner Bros. Pictures,* 113 F. Supp. 265 (S. D. N. Y.), Judge Weinfeld indicated that a court will infer the transmission of confidential information from a client to an attorney during the course of litigation. We submit that the same rule should apply to the transmission of confidential information from one partner to another, especially in a two-man law firm where the major portion of the firm's business consists of motion picture antitrust actions. In the last-cited case Judge Weinfeld stated (pp. 268-269):

> "I am not in accord with Mr. Cooke that Universal is required to show that during the Paramount

litigation it disclosed matters to him related to the instant case. Rather, I hold that the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

"To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. . . ."

Canons 6 and 37 were enacted to protect clients and to preserve in the public mind the integrity of the legal profession. Clearly the former clients of Isacson's employer, Sargoy & Stein, who are defendants herein, should not be saddled with the impossible burden of proving by direct evidence what rests solely in the minds of Malkan and Isacson—that Isacson during his two years with Malkan disclosed his confidential information to Malkan. Short of such a requirement the record below is conclusive against the respondents. The conduct of David H. Isacson and Malkan & Isacson, as indicated in the proceedings before

the Special Master in *Fisher,* rebuts any presumption that might otherwise exist in favor of the proposition that an attorney will not disclose confidential information.

3. The testimony before the Special Master in the *Fisher* proceeding discloses that Isacson solicited clients against the motion picture companies and that other individuals solicited on behalf of Malkan & Isacson. In view of this evidence and the fact that the Special Master found Isacson's answers "incredible" and "unworthy of belief" (Rep. 48, 94, 100; R. 204, 251, 257), one must necessarily infer that Isacson made available confidential information concerning the defendants which he had to Malkan. The interests of the clients of Isacson's former employer cannot be left in jeopardy on the unwarranted assumption that Isacson imparted no confidences to Malkan.

4. Defendants also maintain that paragraph 11 of the stipulation of February 3, 1953, which provides for the disqualification of the firm of Malkan & Isacson in all motion picture antitrust actions against defendants following their disqualification in *Fisher,* operates as a matter of contract law to disqualify Mr. Malkan in this action. A contract entered into by a law firm binds each and every member of the law firm under the aggregate theory of partnership law which is incorporated in Section 20 of the Partnership Law of the State of New York. In failing to disqualify Mr. Malkan on the basis of the stipulation, the Court below has misinterpreted New York law. *Williams* v. *Hartshorn,* 296 N. Y. 49, 51, 69 N. E. 2d 557, 559. Under the aggregate theory of partnership, the only possible effect of the signing of the stipulation in the name of the partnership is to bind each partner individually and

the termination of the partnership cannot release a partner from his contractual obligations to third parties.

The mere dissolution of Malkan & Isacson no more relieves Malkan of his personal duty to abide by the stipulation than would a former corporate officer be relieved, upon his resignation, from the duty to obey an injunction directed to the corporation and its officers. See *Cassidy* v. *Puett Electrical Starting Gate Corp.*, 182 F. 2d 604, 607-608 (4th Cir.). In addition, an agreement by a partnership not to engage in a type of business binds not only the firm *qua* partnership but also each partner individually after the dissolution of the firm. *Love* v. *Stidham*, 18 App. D. C. 306, 53 L. R. A. 397 (D. C. Cir.), held that after a partnership has entered into an agreement that it will not compete, a partner cannot avoid such agreement by acting individually after the dissolution of the partnership.

5. The present action is a so-called spurious "class" action pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure and the complaint invites "all independent indoor theatre owners and operators" in the nation to join in the action (3b). In view of the prior record of solicitation, the numerous cases against petitioners which plaintiff's attorneys and their predecessor firm have commenced both before and subsequent to the *Austin* and *Laskey* cases, and most important the subject matter of the questions presented, petitioners submit that this Court should provide an adjudication of such questions with respect to Mr. Malkan once and for all time. Such an adjudication by this Court will have the beneficial effect, moreover, of avoiding delay in the ultimate disposition of the other cases already brought, or to be brought, by plaintiff's attorneys regardless of the forum chosen by them.

6. It will be too late to review the questions here presented at the end of this litigation. Cf. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541. Petitioners contend that Malkan is disqualified to proceed against them for the same reasons that Isacson and the firm of Malkan & Isacson are disqualified to do so, i.e., because it has been shown, or it must necessarily be inferred, that petitioners' confidential information has been made available to Malkan. If Malkan proceeds with this action on behalf of the plaintiff, there will be no way as a practical matter, regardless of the ultimate result after a trial on the merits, for petitioners to secure a review in this Court of the questions presented. By that stage of the case, full use will have been made of the confidential information.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted herein.

November 9, 1955.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LASKEY BROS. OF W. VA., INC., *et al.*, *Plaintiffs*, vs. WARNER BROS. PICTURES, INC. (In Dissolution), *et al.*, *Defendants.*	Civ. 96-335
AUSTIN THEATRE, INC., *et al.*, *Plaintiffs*, vs. WARNER BROS. PICTURES, INC. (In Dissolution), *et al.*, *Defendants.*	Civ. 96-334

DAWSON, D. J.:

This matter presents the issues as to whether (1) a law firm and both the members thereof are disqualified from representing a plaintiff in an action where one of the members in the firm had previously represented the adverse parties in similar litigation and had, as a result of such litigation, been in a position to receive confidential information from such former clients; and (2) if, by reason of such facts, the firm, and both the members thereof, are disqualified from representing the plaintiff, does the disqualification continue as to additional new cases as to an individual partner when the partner who has previously

been in the adverse position severs his connection with the firm.

The matter comes on for determination as a result of a motion made by plaintiffs for an order that the law firm of Malkan & Ellner, and the members thereof, Arnold G. Malkan and J. Robert Ellner, may properly represent and are not barred or disqualified from representing the plaintiffs in these actions.

The defendants have cross-moved for an order disqualifying Arnold G. Malkan and J. Robert Ellner, both individually and as a firm, from representing the plaintiffs in the above-entitled actions or, in the alternative, staying all further proceedings in the above-entitled actions, in accordance with the provisions of a stipulation, dated February 3, 1953, in an action now pending in the United States District Court for the Eastern District of New York entitled *Fisher Studios, Inc., et ano.* v. *Loew's, Inc., et al.*, Civil Action No. 12920, and staying all further proceedings in these actions pending the final determination of the matters raised in this motion.

This is a triple damage and injunction action under the anti-trust laws. The complaints were filed on November 8, 1954. Within fifteen days thereafter, plaintiffs' attorneys brought on this motion for an order declaring that the present attorneys are not disqualified from representing the plaintiffs in the action.

The fact that the plaintiffs' attorneys found it necessary to apply for an order that they were not disqualified from representing plaintiffs is unusual. It appears that on November 7, 1952, Judge Abruzzo, in the Eastern District of New York, in an action entitled *Fisher Studios, Inc., et ano.* v. *Loew's, Inc., et al.*, Civil Action No. 12920, signed

an order directing plaintiffs in that action and Arnold G. Malkan and David H. Isacson, practicing law as the firm of Malkan & Isacson, to show cause why the said firm and each member thereof should not be disqualified from acting as attorneys for the plaintiffs in that action. The matter was referred to a Special Master.

In the hearings before the Master, defendants sought to show, among other things, that Mr. Isacson, while employed as an attorney by the firm of Sargoy & Stein, a law firm which represented, and still represents, the principal defendants in certain matters, had access to and did, in fact, obtain confidential information concerning the business of the defendants which he and the firm of Malkan & Isacson would be able to use against them in the anti-trust action. Defendants asserted not only that Mr. Isacson's retainer would involve disclosure of confidences, but also that he had unethically solicited clients to bring anti-trust suits against the motion picture companies. Long hearings were held before the Special Master and on August 19, 1953, Harold F. McNiece, Esq., as Special Master, rendered a Report in which he held that the defendants had clearly shown both solicitation and abuse of confidential relationship and that, accordingly, the interests of justice required that Mr. Isacson and the firm of Malkan & Isacson be disqualified from representing the plaintiffs in that action.

In the course of the hearings before the Master, and on February 3, 1953, the defendants, the plaintiffs, Mr. Isacson, and Malkan & Isacson stipulated to stay all other actions involving the defendants in which Malkan & Isacson were opposing counsel. In order to avoid multiplicity of motions, this stipulation further provided:

"11. If it shall be finally determined in this action that David H. Isacson and Malkan & Isacson are qualified or disqualified, and if such determination in this proceeding is that such qualification or disqualification embraces 35 mm. anti-trust actions, 16 mm. anti-trust actions and under-reporting actions, such determination shall be binding upon David H. Isacson, Malkan & Isacson, and the defendants herein, in all cases involving 35 mm. anti-trust actions, 16 mm. anti-trust actions and under-reporting actions, including those hereinabove mentioned."

On April 14, 1954, Judge Abruzzo entered an order confirming the Special Master's Report and authorizing the entry of an order directing the disqualification of David H. Isacson and the firm of Malkan & Isacson from representing the plaintiffs in the *Fisher* action.

Some of the defendants in that action are also defendants in the present action.

It appears from testimony taken before me that the firm of Malkan & Isacson was established in or about July of 1952 and was dissolved on or about July 1, 1954; that on or about August 1, 1954, the firm of Malkan & Ellner was formed.* Thereafter, the present two actions were

*Mr. Malkan stated that his partnership with Mr. Isacson and his present partnership with Mr. Ellner have not been real partnerships "because neither of them share in any losses". As to Mr. Ellner, he said: "I felt that it would be a nice thing for Mr. Ellner to have his name associated as a partner. It would help him bring in business and would not cost me anything in particular and, again, he was not to share in any of the pending cases, except in my discretion". It is a violation of the standards of ethics of the legal profession for attorneys to hold themselves out as a partnership where no partnership, in fact, exists. See *"Legal Ethics"* by Henry S. Drinker, p. 204, and opinions cited therein.

instituted by this firm of Malkan & Ellner. The Arnold G. Malkan in that firm was the Malkan who had been a member of the firm of Malkan & Isacson.

On November 9, 1954, Judge Abruzzo signed an order to show cause in the *Fisher Studios* matter directing the plaintiffs and Arnold G. Malkan and J. Robert Ellner, individually, and the firm of Malkan & Ellner to show cause why the aforesaid stipulation should not be deemed binding upon the said Arnold G. Malkan, his present law firm of Malkan & Ellner, and the members thereof, and why such firm should not be disqualified from acting as attorneys for the plaintiffs in all 35 mm. anti-trust actions, 16 mm. anti-trust actions, and percentage under-reporting actions in which the parties plaintiff or defendant include motion picture producing or distributing companies represented by the law firm of Sargoy & Stein during the employment by such firm of said David H. Isacson as an attorney on the firm's staff.

On March 22, 1955, Judge Abruzzo handed down an order which provided, in part:

> "AND IT IS FURTHER ORDERED AND ADJUDGED that the said stipulation dated February 3, 1953 is binding upon the firm of Malkan & Isacson, David H. Isacson and Arnold G. Malkan, as a member of the firm of Malkan & Isacson and upon any firm with which they or any of them may now or hereafter be associated in all cases now pending in all courts as well as the cases which might hereafter be brought involving 35 mm anti-trust cases, 16 mm anti-trust cases and/or under-reporting cases in which the defendants herein or any of them are or may be parties;

> "AND IT IS FURTHER ORDERED AND ADJUDGED that the defendants are and shall be within their legal rights in all cases now pending or hereafter to be brought in which the defendants herein or any of them are or may be parties involving 35 mm anti-trust cases, 16 mm anti-trust cases and/or under-reporting cases to urge the contents of said stipulation of February 3, 1953, this order, and the decisions heretofore rendered in this cause against Arnold G. Malkan as a member of the firm of Malkan & Isacson."

In the opinion of Judge Abruzzo of February 24, 1955, which preceded the entry of the foregoing order, he stated:

> "With regard to other actions pending in other district courts of a similar nature, the defendants in this motion have requested an order that the stipulation of February 3d be invoked in those cases. I have no power to make an order which would be binding on these courts. Undoubtedly, defendants have the legal right in these jurisdictions to urge the contents of the stipulation of February 3, 1953, and the decisions heretofore rendered in the instant case."

We thus have a judicial construction by Judge Abruzzo of the effect of the stipulation entered into in the proceeding which was pending before him. It was his determination that the stipulation was binding upon the individual members of the firm of Malkan & Isacson and upon any firm with which they, or any of them, may now or hereafter be associated in all cases now pending in all courts, as well as the cases which might hereafter be brought of the nature described in his order.

In order that the relationship of Mr. Malkan to the firm of Malkan & Ellner and the plaintiffs in the above-

entitled actions might be ascertained, I held a hearing at which testimony was taken. The testimony of Mr. Malkan indicated that when he formed a partnership with Mr. Isacson in 1952, it was agreed between them that as to matters which Mr. Isacson might bring into the firm and as to motion picture litigation, the fees would be shared equally between them. Mr. Malkan further testified that there was no written agreement of dissolution of the firm of Malkan & Isacson, but a fair summary of the situation would be to say that Mr. Malkan took over most of the anti-trust actions then pending in the office and that Mr. Isacson took over most of the general matters. He stated that most of the motion picture anti-trust actions had been taken on a contingent fee basis, and that although Mr. Isacson had brought most of them in and had done a substantial part of the work which had been done on them, Mr. Isacson retained no interest in any fees that thereafter might be collected on any contingent fee arrangements. He stated, however, that there was no written agreement with Mr. Isacson to this effect, but indicated that he had paid Mr. Isacson $5,000 for services rendered in connection with other anti-trust actions, and that this was considered by him to be in full settlement of any interest that Mr. Isacson had in the firm or in any matters pending in the firm. The lack of any formal agreement of dissolution or any formal settlement of the affairs of the firm is strange. It might be contended that Mr. Isacson either had a continuing interest in any contingent fees that might thereafter be obtained on cases brought to the office by him or, in the alternative, that the $5,000 paid to him was a payment for any claim that he might have to share in those contingent fees.

With respect to the two cases now pending in this Court, Mr. Malkan testified that the Laskey Bros. matter

first came to the firm of Malkan & Isacson through Mr. Isacson, and that he had not met Mr. Laskey until after the dissolution of the firm of Malkan & Isacson. Mr. Malkan further testified that an action was brought in the Western District of Pennsylvania in 1953 by Laskey Bros. of West Virginia, Inc. through the firm of Malkan & Isacson; that the suit is still pending in Pennsylvania; and that the suit in the Western District of Pennsylvania involves the same issues as the suit which was brought in New York; but that the instant case in New York was brought after the firm of Malkan & Isacson was dissolved.

Mr. Malkan testified that so far as the second action, wherein the plaintiff is Austin Theatre, Inc., he had not been approached with respect to being retained until sometime in September of 1954, at which time the firm of Malkan & Isacson had been dissolved and the firm of Malkan & Ellner formed; that this referral had come to him totally apart from his previous partnership with Mr. Isacson and that as far as he knew, the principals in the Austin Theatre case did not know Mr. Isacson.

Of course, after the dissolution of the firm, each partner was free to practice law individually, and that included the right to receive retainers from persons who had been clients of the former firm. *Talley* v. *Lamb,* 100 N. Y. S. 2d 112, 118 (N. Y. Co., 1950).

It is a fundamental principle that the obligation to represent a client with undivided fidelity "forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."*

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*American Bar Association Canons of Professional Ethics, Canon 6; See Rule 5, Subdivision (c) of the General Rules of the United States District Court for the Southern District of New York whereby the Canons were adopted as rules of the Court.

Where an attorney does accept a retainer or employment from others in matters adversely affecting any interest of a client with respect to which confidence has been reposed, the Court may disqualify such attorney "and any firm with which he may be associated" from participating in the matter where the conflict arises.*

As to Mr. Isacson and the firm of Malkan & Isacson, the finding that such conflict existed appears sufficiently from the record before Judge Abruzzo and from the determination of Judge Abruzzo, and from the stipulation entered into in the course of that proceeding which was signed by Mr. Isacson and the firm of Malkan & Isacson. No further testimony thereon is necessary.

However, when Mr. Malkan and Mr. Isacson dissolved their firm, does that disqualification continue as to all future activities of Mr. Malkan in motion picture anti-trust cases, as well as the activities of Mr. Isacson? That is the question which is before this Court.**

**Consolidated Theatres* v. *Warner Bros. Cir. Man. Corp.*, 216 F. 2d 920, 928 (C. A. 2, 1954).

***It has been urged by Mr. Malkan that the disqualification does not extend to him after he has once severed his relationship with Mr. Isacson. He urges that in the *Consolidated Theatres* case, to which reference has been made, although the firm of Gold & Nickerson and Mr. Nickerson, individually, were disqualified from representing the plaintiff, Mr. Gold continued, and continues, to represent the plaintiff in that action. Mr. Malkan urges that the defendants in that case sought to have Gold disqualified and were not successful. However, it appears that there was no mention of that particular point in the Court of Appeals decision, and the reason may perhaps be found in Judge Goddard's unreported opinion in the District Court, where the following statement appears:

> "Defendants conceded before the Master that any question as to ethical duties of Mr. Gold, separate and apart from any partnership with Mr. Nickerson, is not involved in this proceeding, and to that view the attorneys for Gold & Nickerson have subscribed." *Consolidated Theatres, Inc., et ano.* v. *Warner Bros. Circuit Management Corporation, et al.*, Civ. No. 65-254 (S. D. N. Y. July 21, 1953)

The factual situation with reference to the two separate actions involved in this motion would seem to require a separate determination as to each action.

The first case, in which the plaintiffs include Laskey Bros. of West Virginia, Inc., came to the firm of Malkan & Isacson at a time when that firm was disqualified from handling it. The fact that the instant action was brought in this Court after the firm was dissolved should make no difference in the qualification of Mr. Malkan to handle the case, inasmuch as the action is based upon the same set of facts as the one which Malkan & Isacson previously had been retained to institute, and which that firm has instituted, in Pennsylvania. At the time of the retainer, Mr. Isacson was disqualified from handling any such case; and since Mr. Malkan was then his partner, he was equally disqualified from handling the case.*

As Mr. Malkan, as well as Mr. Isacson, was disqualified from handling that case at a time it first came to their office, this disqualification cannot be cured by the dissolution of the partnership. Once the attorney was disqualified from handling the case, he remains disqualified.

As to the second case involving Austin Theatre, Inc., it appears that the case first came to Mr. Malkan after the partnership with Mr. Isacson had been dissolved and that Mr. Isacson had never had any association with that case. The only basis of disqualifying Mr. Malkan (and his present firm of Malkan & Ellner) in connection with that action would be that having once been a partner with a

*The disqualification of one partner is a disqualification of all of the partners. Such disqualification would also apply to attorneys, not partners, having offices together. Where such situation exists, both partners, or the partner and the associate, should retire from the case. Drinker, *"Legal Ethics"*, p. 106, and opinions there cited.

man who was disqualified from handling a case of that nature, he could never thereafter handle such a case; or on the further ground that by reason of his partnership with Mr. Isacson, he had acquired confidential information from Mr. Isacson in violation of Mr. Isacson's duty to his former client. There has been no evidence presented that Mr. Malkan acquired such confidential information, and the burden would be upon the defendants to assert or offer proof that he had acquired such confidential information. This they have not done.

I do not believe that it can successfully be contended that because an attorney not otherwise disqualified has been a partner of, or associated with, a man who was disqualified from handling a particular type of litigation, that he remains disqualified forever, even after the disqualified person's association with the litigation terminates.*

Judge Abruzzo had construed the stipulation of February 3, 1953 not only as binding upon David H. Isacson and Arnold G. Malkan, as members of the firm of Malkan & Isacson, but also upon any firm with which they, or any of them, may now or hereafter be associated. I do not so construe the stipulation. It is certainly binding upon the firm of Malkan & Isacson, for it is signed on behalf of that firm; but there is no indication that it is binding upon the individuals who comprised the firm, when their relationship with the firm has terminated. The stipulation was not signed by Mr. Malkan individually.

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*See *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc., et al.*, 113 F. Supp. 265 (S. D. N. Y. 1953) and *Harvey* v. *Harvey*, 202 Wisc. 553, 231 N. W. 580 (1930) where attorneys associated, in the trial of an action, with disqualified counsel, were not found disqualified themselves.

Under Section 20 of the Partnership Law, the act of any partner, including the execution in the partnership name of any instrument, "for apparently carrying on in the usual way the business of the partnership of which he is a member" binds the partnership; but an act of a partner "which is not apparently for the carrying out of the business of the partnership in the usual way" does not bind the partnership unless authorized by the other partners. For example, under this provision of the statute, one or more, but less than all, of the partners have no authority to do any act which would make it impossible to carry on the ordinary business of the partnership, to confess a judgment, or to submit a partnership claim or liability to arbitration or reference.*

In *Commissioner of Internal Revenue* v. *Whitney*,** the Court of Appeals said at p. 567:

> "It is a matter of well understood history (to which we have often referred, as in the cases from this Circuit cited below) that the drafters of the [partnership] act rejected the entity theory for 'the common law or aggregate theory' . . . Accordingly, the assent of all the partners is necessary in order to dispose of the goodwill of the business, or to do any act making it impossible to carry on its ordinary business, or to assign a partner's right in specific property of the firm."

It is equally true that the assent of all the partners would be necessary to an agreement which would forfeit each

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*See, for example, *Scanlon* v. *Kuehn*, 225 App. Div. 256, 232 N. Y. Supp. 592 (2d Dept. 1929); *Riley* v. *Larocque*, 163 Misc. 423, 297 N. Y. Supp. 756 (N. Y. Co. 1937).

**169 F. 2d 562 (2d Cir. 1948), cert. den. 335 U. S. 892 (1948).

individual partner's right to engage in a particular line of business.

I do not believe that the stipulation signed on behalf of Malkan & Isacson (but not signed individually by Malkan) can be construed as binding the individual members of that firm when they were no longer members of that firm. It would stretch the theory of partnership authority very far to assume that a stipulation that the firm would not participate in certain types of business, signed on behalf of a firm, was binding not only on the firm but also upon the individual partners after the firm was dissolved and for as long as any of them might live. Certainly, it was not an agreement for carrying on the business of the partnership.

With respect to *Laskey Bros. of W. Va., Inc., et al.* v. *Warner Bros. Pictures, Inc. (In Dissolution), et al.*, motion denied; cross-motion granted.

With respect to *Austin Theatre, Inc., et al.* v. *Warner Bros. Pictures, Inc. (In Dissolution), et al.*, motion granted; cross-motion denied.

Settle order on two days' notice.

Dated: New York, N. Y.
March 29, 1955

ARCHIE O. DAWSON
U. S. D. J.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 338, 343, October Term, 1954.

Argued June 6, 7, 1955 Decided July 13, 1955

Docket Nos. 23610, 23672

LASKEY BROS. OF W. VA., INC., *et al.*,
Plaintiffs-Appellants,

v.

WARNER BROS. PICTURES, INC.
(In Dissolution) et al.,
Defendants-Appellees.

AUSTIN THEATRE, INC., *et al.*,
Plaintiffs-Appellees,

v.

WARNER BROS. PICTURES, INC.
(In Dissolution) et al.,
Defendants-Appellants.

Before CLARK, Chief Judge, CHASE, Circuit Judge, and RYAN, District Judge.

Appeal from the United States District Court for the Southern District of New York, Archie O. Dawson, Judge.

Plaintiff Laskey Bros. of W. Va., Inc., and its attorneys Arnold Malkan, Malkan & Ellner, and J. Robert Ellner appeal from an order disqualifying the attorneys from representing the plaintiff in its anti-trust action against the

defendant motion picture companies; and the defendant companies appeal from an order refusing to disqualify the same atorneys in the anti-trust action brought against them by Austin Theatre, Inc. D. C. S. D. N. Y., 130 F. Supp. 514. In both appeals, orders affirmed.

CLARK, Chief Judge.

These appeals involve the qualification of the firm of Malkan & Ellner to serve as attorneys for plaintiffs in private anti-trust actions involving the motion picture industry. Disqualification was sought by the defendants on the basis of Malkan's prior partnership with one Isacson. In proceedings independent of those here under review, Isacson has been found to have obtained confidential information about the defendants in the course of his former employment by the firm of Sargoy & Stein. The history of this litigation is set forth in detail in the opinion of the district court in this proceeding, so that we need not repeat it here. D. C. S. D. N. Y., 130 F. Supp. 514. Judge Dawson concluded that Malkan & Ellner should be disqualified in the *Laskey* case, which had originally come to the firm of Malkan & Isacson. The plaintiffs and the attorneys appeal from this determination. In the *Austin* case—the second of these two actions heard and decided together below—Judge Dawson decided that the new firm was not disqualified, since this client had come to it by channels completely apart from Malkan's former association with Isacson. Here the defendants appeal.

The defendants rely heavily in both cases on a stipulation which they read as barring, as a matter of contract law, any representation of motion-picture anti-trust-action plaintiffs by these attorneys. The stipulation in question was

entered into before the formation of the firm of Malkan & Ellner, in the course of the litigation in *Fisher Studios, Inc.* v. *Loew's Inc.* then pending in the District Court for the Eastern District of New York. In that case the qualification of Isacson and the firm of Malkan & Isacson was first raised; and, in view of the pendency of similar suits elsewhere, the parties stipulated that: "If it shall be finally determined in this action that David H. Isacson and Malkan & Isacson are qualified or disqualified, and if such determination in this proceeding is that such qualification or disqualification embraces 35 mm. anti-trust actions, 16 mm. anti-trust actions and under-reporting actions, such determination shall be binding upon David H. Isacson, Malkan & Isacson, and the defendants herein, in all cases involving 35 mm. anti-trust actions, 16 mm. anti-trust actions and under-reporting actions, including those hereinabove mentioned." Since the *Fisher* proceedings resulted in the disqualification of Isacson and the firm of Malkan & Isacson by Judge Abruzzo, defendants urge us to enforce this stipulation against Malkan and Malkan & Ellner in these cases.

The decision in the *Fisher* case has been appealed, but not yet argued. For present purposes, therefore, we accept the actual disqualifications entered there. But beyond this we cannot agree that the stipulation should affect any cases other than those which came to Malkan & Isacson or to Isacson individually. The wording of the stipulation seems unambiguously to exclude disqualification of Malkan as an individual. There is no reason to invoke complicated theories of partnership law to construe so clear a document which on its face evidences no intent to bind Malkan except in his role as a partner to Isacson.

Defendants also contend that the stipulation is binding on Malkan because Judge Abruzzo so held in a decision

which should be held res judicata here. Judge Abruzzo was repeatedly asked by the defendants to bar Malkan individually from this litigation, and repeatedly refused to do so, until his attention was focused on the stipulation. This caused him to issue an amended order of disqualification to cover "Malkan & Isacson, David H. Isacson and Arnold G. Malkan, as a member of the firm of Malkan & Isacson and * * * any firm with which they or any of them may now or hereafter be associated." In the same order he refused, however, to pass upon the qualification of the firm of Malkan & Ellner. Furthermore, the photostatic copy of the order in the record discloses that it originally purported to cover "Arnold G. Malkan individually and any firm with which the said Arnold G. Malkan may be associated," and that this version was changed to substitute therefor "Arnold G. Malkan as a member of the firm of Malkan & Isacson." The stress which Judge Abruzzo placed on this correction is shown by the fact that he wrote and initialled it in three separate places. It seems fairly clear, therefore, that the judge did not intend to exclude Malkan individually. Even if his order can be so read, we think, as did Judge Dawson, that it cannot be res judicata in these cases affecting two completely independent plaintiffs and involving the qualification of a new law firm, Malkan & Ellner, as to which Judge Abruzzo specifically refused to rule.

Even thus limited, the stipulation does, however, support Judge Dawson's ruling in the *Laskey* case. That plaintiff first came to the firm of Malkan & Isacson to initiate an anti-trust action in the Western District of Pennsylvania. Subsequently a new suit was begun for this plaintiff by Malkan & Ellner in the Southern District of New York, but it is not contended that these suits differ in any mate-

rial respect. It seems clear that under the stipulation the firm of Malkan & Isacson was barred from prosecuting this case. We would come to the same conclusion without the stipulation, since all authorities agree that all members of a partnership are barred from participating in a case from which one partner is disqualified. *Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 2 Cir., 216 F. 2d 920; Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 Yale L. J. 917, 920; Drinker, Legal Ethics 106 (1953). And once a partner is thus vicariously disqualified for a particular case, the subsequent dissolution of the partnership cannot cure his ineligibility to act as counsel in that case. The decision in *Laskey* is therefore affirmed.

This brings us to the more difficult question of legal ethics posed by the *Austin* case. This case came to the new firm of Malkan & Ellner through channels having nothing whatsoever to do with Malkan's prior association with Isacson. Judge Dawson decided that disqualification of the firm of Malkan & Isacson should not carry over to Malkan & Ellner in the absence of any showing that Malkan had received confidential information from Isacson.

Defendants contend that either receipt of confidential information should be conclusively presumed from the fact of partnership or alternatively Malkan should at least have the burden of rebutting such an inference. Within the framework of the original partnership the fact of access to confidential information through the person of the partner with such specialized knowledge is sufficient to bar the other partners, whether or not they actually profit from such access. Such a result, although an extension of the literal wording of Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association, is necessary to

facilitate maximum disclosure of relevant facts on the part of clients. Once the partnership is dissolved, however, the inference from access to receipt of information, in a new case having no relationship to the old partnership, becomes logically less compelling and should therefore become rebuttable legally, lest the chain of disqualification become endless.

Thus an irrebuttable inference that confidential information had been received would result in Malkan's disqualification for partnership with Isacson, and Ellner's disqualification for partnership with Malkan. Since the degree of association to effect disqualification need not necessarily be that of a partner, young lawyers might seriously jeopardize their careers by temporary affiliation with large law firms. But even more important is the effect on litigants who may seriously feel they have claims worthy of judicial testing, but are prejudiced in securing proper representation. For the net effect of an overharsh rule of disqualification must be to hinder adequate protection of clients' interests in view of the difficulty in discovering technically trained attorneys in specialized areas who were not disqualified, due to their peripheral or temporally remote connections with attorneys for the other side. See Note, 64 Yale L. J. 917, 928. The necessity of judicial recognition of the contingent fee is an appropriate analogy.

In this case Malkan has successfully met the burden of rebutting the inference that he received confidential information from Isacson. Malkan testified in a hearing before Judge Dawson that he had received no such information, and Judge Dawson obviously believed him. The only indications to the contrary to which the defendants advert are that Malkan and Isacson signed complaints in several anti-

trust actions involving the distribution of motion pictures, and that Malkan and Isacson together solicited clients for their firm. This is not enough to overcome the favorable effect of Malkan's testimony and demeanor as appraised by the trial judge. Malkan had long been engaged in private anti-trust actions in other fields before he met Isacson, and can be presumed to have had independent know-how on the drawing of an appropriate complaint in such an action. The alleged solicitation, on which there was no clear ruling in the *Fisher* proceedings, is irrelevant to the question of violation of confidences. It will not do to make the presumption of confidential information rebuttable and then to make the standard of proof for rebuttal unattainably high. This is particularly true where, as here, the attorney must prove a negative, which is always a difficult burden to meet.

We therefore conclude that the judgment in the *Austin* case must be affirmed.

In both appeals the orders are affirmed.

APPENDIX C

RYAN, D. J., (dissenting).

These appeals present the question whether the professional obligations of Arnold G. Malkan, J. Robert Ellner, and the law firm of Malkan & Ellner prevent them from continuing to appear for and represent the plaintiffs in two private anti-trust suits filed against a number of motion picture producers, distributors and exhibitors.

The plaintiff in each suit moved in the District Court for an order declaring that these attorneys and the law firm were "qualified to represent it"; the defendants thereupon cross moved for an order "disqualifying" them. The motions came on before Judge Dawson, who, after hearing, held in the Laskey suit that "Arnold G. Malkan and the law firm of Malkan & Ellner and J. Robert Ellner as a member of said firm are disqualified from representing the plaintiff" and in the Austin suit that "Arnold G. Malkan, J. Robert Ellner and the law firm of Malkan & Ellner may properly represent and are not barred or disqualified from representing the plaintiff." Appeals have been filed by the aggrieved parties from the orders entered by Judge Dawson on these determinations.

Judge Dawson reached this result in the Laskey suit by finding that disqualification to act as attorney for the plaintiff Laskey existed because that corporation had previously retained and was represented by the law firm of Malkan & Isacson in which Malkan had been a partner. And, it was because the plaintiff Austin had never retained Malkan & Isacson and had come to Malkan after the dissolution of that firm, that Judge Dawson concluded there was no disqualification in the Austin suit.

This court is in unanimous agreement with the ruling of Judge Dawson in the Laskey suit, except that I would not limit Ellner's disqualification to the period during which he continues a member of the firm of Malkan & Ellner, but would declare Ellner, as Malkan, disqualified from acting as attorney for any client seeking to enforce a private anti-trust motion picture claim against these defendants. I would modify the order entered in the Laskey suit to so provide. The ethical obligations which here disqualify Ellner from appearing as attorney for the plaintiffs in these suits are personal to him as an individual and as a member of the Bar; he may not free himself of them simply by breaking off his professional associations or shed them as a change of attire.

I disagree with my distinguished colleagues as to the Austin suit; as to it I would sustain the appeal, and enter an order of disqualification equally as broad in scope as in Laskey.

Because I subscribe to the belief that

> "Unless courts delineate the various policy considerations motivating their decisions, precedents offer little guidance to attorneys seeking to fulfill their ethical obligations" (The Yale Law Journal, Vol. 64, p. 298, May, 1955),

I feel impelled to write at length. To properly appraise the ethical obligations of Malkan and Ellner to the defendants their prior professional activities and associations must be ascertained and this is particularly so with respect to Malkan's association with David H. Isacson.

In November, 1946, Isacson entered the employ of the law firm of Sargoy & Stein. It was at the time of a large office. He remained in their employ until March, 1951.

For several years prior to Isacson's employment the firm had represented a number of motion picture companies in prosecuting claims for rental of motion picture films arising from alleged under-reporting of box office receipts by theatre licensees. Sargoy & Stein would cause theatre box office audits to be made by their staff and in almost 500 instances caused suit to be filed to collect on alleged under-reportings. Isacson at first took part in these audits and later spent the major portion of his time taking depositions in examinations before trial. These depositions covered many phases of the relationship of the theatres with the motion picture companies. To assist him in taking these depositions Isacson had complete access to the firm's files which contained an abundance of data and information, not only gathered by this law firm but also disclosed to and confided in it by the motion picture companies concerning the manner in which the companies did business in the 16mm. as well as the 35mm. field.

The firm also assisted the general counsel of the motion picture companies in the preparation and defense of a number of private anti-trust suits filed against them. Much of the confidential data in the firm's files was collated and gathered in this work; it concerned the licensing of 16mm. pictures for exhibition; the limitations, if any, on the distribution, and the terms of the licenses.

Isacson's professional status in the firm rose in importance within a short time. His name was placed on the firm letterhead by October, 1947. He soon left off routine work of the audits and took part in the ensuing litigation. Of the 464 under-reporting suits filed while he was with Sargoy & Stein, in at least 233 of them anti-trust defenses or counterclaims had been interposed. Isacson took some part

in 170 of these suits and participated in taking depositions in 72, and at least in 31 interrogated witnesses concerning anti-trust claims. Isacson also participated in litigation involving 35mm. pictures in which anti-trust violations were alleged.

Sargoy & Stein also investigated information which it had received from 16mm. dealers, concerning the illegal duplicating of 16mm. prints; among these dealers was Robert V. Fisher who occasionally visited the office of the firm and Carl J. Kunz.

There is no question but that Isacson, while in the employ of Sargoy & Stein, enjoyed the confidence and trust of the firm and of their clients in the motion picture industry. He had unrestricted access to the confidential data they had disclosed to the firm; and much of this would unquestionably be of great assistance to one prosecuting a claim of an anti-trust violation against those companies. An obligation of fidelity and loyalty was voluntarily assumed by his employers; Isacson was in the same way bound to the firm's clients; his obligation was no less than that of his employers, the partners of the firm; and that obligation remained with him after he left the firm in March, 1951 with respect to the confidences in which he had shared.

Isacson, admitted to the Bar in 1940, had prior to his employment by Sargoy & Stein no extensive experience as an attorney. After graduation from law school he had worked for a time for several attorneys and from 1942 to 1945 had been employed as a welder in shipyards. He served a short ime in the Army and then had been unsuccessful in establishing a law practice. It was with this very limited professional training that he had come to Sargoy & Stein. After leaving them he had handled occasional legal matters

for friends and had represented his father in the purchase and subsequent sale of a garage and for a time assisted in operating it. For sixteen months or so he unsuccessfully sought legal employment and tried to rejoin Sargoy & Stein. Finally, Isacson was introduced to Malkan by a cousin who had been a classmate of Malkan's in law school. After several months of discussion the law firm of Malkan & Isacson was formed in July, 1952.

At the time Malkan had a fairly well equipped office in operation; Isacson brought in but little furniture. Malkan testified that "it was not an equal partnership"; as to certain major pending litigation Isacson had no specific share but would be compensated for any work he might do; and as to "matters which Mr. Isacson might bring in and as to matters in the motion picture field with the exception of certain matters which were more or less under negotiation with me at the time, he and I would share equally in motion picture fees and he would have some share in any new cases that I got after that."

At the time of this association between Malkan and Isacson, Malkan had been consulted in connection with private anti-trust motion picture litigation but he had not been retained. While they were together the firm had a number of these cases. It is undisputed that in the major portion of the litigation in which the two-man firm of Malkan & Isacson appeared they represented plaintiffs in treble damage anti-trust suits, and that prior to the formation of the firm Malkan had been quite active in litigation of this type, but not in the motion picture field. Isacson supplied the technical knowledge of the operations in this industry, which Malkan lacked; Malkan furnished the office, the practical experience in the prosecution of plaintiffs' anti-

trust claims and, it seems from his statements, the financial support necessary to the firm. This was all well, except that Isacson also brought with him to this new venture in the motion picture field knowledge of all the anti-trust data which had been gathered by Sargoy & Stein from information imparted to them and their staff by their clients.

In the Independent Film Journal, issue of August 9, 1952, there appeared a squib reading—

> "David H. Isacson, formerly of the law firm of Sargoy and Stein, became associated with Arnold Malkin, prominent New York attorney . . ."

Isacson had been doing a bit of photographic work for a few years. Although the article in "doctored photographic form" accompanied by announcement cards was sent by him to four or five persons, there is no direct proof that Isacson's skill accomplished the job. In the altered form, the misspelling of Malkan's name was corrected and following this the words "anti-trust" were inserted between the words "prominent" and "attorney," and the name of the publication with the date line was shifted so as to appear immediately below the article.

At least sixty-five announcements were sent out; a half dozen or more went to exhibitors or attorneys for exhibitors; on some Isacson wrote personal notes. In one note to an attorney, who represents independent exhibitors, Isacson wrote that since his days with Sargoy & Stein he had "come to see the light and have undertaken to represent exhibitors (the salt of the earth, God bless them)." An announcement and copy of the altered article were sent to two motion picture exhibitors who were then parties to litigation against clients of Sargoy & Stein.

It was against this background that the new combination of Malkan & Isacson appeared as attorneys for Fisher Studio Inc. and Robert V. Fisher, plaintiffs, in a private anti-trust suit filed in the Eastern District of New York in September, 1952. This suit involves charges of restraints on 16mm. film.

Robert V. Fisher had called at the office of Sargoy & Stein during 1946 and 1948. He had met Isacson in the Spring of 1948 there. In August, 1952, after Fisher read of the suit filed by the Government in the District Court for the Southern District of California against Twentieth-Century Fox-Film Corporation, et al., he discussed with Isacson the question of filing a complaint by Fisher Studio against the distributors of 16mm. film and retained Isacson. Fisher apparently thought it a good idea to inform others in the industry of what he was doing and later Isacson addressed a meeting attended by 10 or 12 people out of 30 invited.

The defendants in the Fisher suit moved to disqualify Malkan and Isacson and the firm. Judge Abruzzo on November 19, 1952 referred the matter to Harold F. McNiece, Esq., as Special Master to hear and report. Mr. McNiece is a member of the Bar exceptionally well qualified and competent to perform such a task. Numerous hearings were held by him and he filed a comprehensive report on April 19, 1953. The report is part of the record before this Court. In it the facts recited above are found. The Master noted that—

> "Mr. Isacson was present throughout the hearings. He . . . was throughout a most unimpressive witness. * * * His memory was particularly poor on matters which were unfavorable to him, though ofttimes remarkably good on favorable ones. * * *"

The Special Master found, when denying a motion to strike from the record evidence of solicitation —

> "The evidence of solicitation shows that Mr. Isacson peddled confidential information and violated his duty toward his former clients and is therefore relevant on the confidential information issue."

After the filing of the Special Master's report, Judge Abruzzo by order filed April 13, 1954 disqualified Isacson and the firm of Malkan & Isacson from representing the plaintiffs in the Fisher suit.

An appeal was filed from this order, but it has not been brought on for hearing. Argument on the instant appeals was made on the premise that the order of disqualification of Isacson was properly made. Indeed, on the record this is clearly so.

While the matter was pending before Mr. McNiece in the Fisher suit, the attorneys for the defendants and the attorneys for Isacson and Malkan & Isacson entered into a stipulation in which along with other matters it was provided—

> "11. If it shall be finally determined in this action that David H. Isacson and Malkan & Isacson are qualified or disqualified, and if such determination on this proceeding is that such qualification or disqualification embraces 35mm. anti-trust actions, 16mm. anti-trust actions and under-reporting actions, such determination shall be binding upon David H. Isacson, Malkan & Isacson, and the defendants herein, in all cases involving 35mm. anti-trust actions, 16mm. anti-trust actions and under-reporting actions, including those hereinabove mentioned."

Following Judge Abruzzo's order the firm of Malkan & Isacson was dissolved about July 1, 1954. About a month later the firm of Malkan & Ellner was formed. It was found by Judge Dawson that as to Malkan—

> ". . . his partnership with Mr. Isacson and his present partnership with Mr. Ellner have not been real partnerships 'because neither of them share in any losses.' As to Mr. Ellner, he said: 'I felt that it would be a nice thing for Mr. Ellner to have his name associated as a partner. It would help him bring in business and would not cost me anything in particular and, again, he was not to share in any of the pending cases, except in my discretion.' * * * *"

Concerning the dissolution of the firm of Malkan & Isacson Judge Dawson wrote:

> "The testimony of Mr. Malkan indicated that when he formed a partnership with Mr. Isacson in 1952, it was agreed between them that as to matters which Mr. Isacson might bring into the firm and as to motion picture litigation, the fees would be shared equally between them. Mr. Malkan further testified that there was no written agreement of dissolution of the firm of Malkan & Isacson, but a fair summary of the situation would be to say that Mr. Malkan took over most of the anti-trust actions then pending in the office and that Mr. Isacson took over most of the general matters. He stated that most of the motion picture anti-trust actions had been taken on a contingent fee basis, and that although Mr. Isacson had brought most of them in and had done a substantial part of the work which had been done on them, Mr. Isacson retained no interest in any fees that thereafter might be collected on any contingent fee arrangements. He stated, however,

that there was no written agreement with Mr. Isacson to this effect, but indicated that he had paid Mr. Isacson $5,000 for services rendered in connection with other anti-trust actions, and that this was considered by him to be in full settlement of any interest that Mr. Isacson had in the firm or in any matters pending in the firm. The lack of any formal agreement of dissolution or any formal settlement of the affairs of the firm is strange. It might be contended that Mr. Isacson either had a continuing interest in any contingent fees that might thereafter be obtained on cases brought to the office by him or, in the alternative, that the $5000 paid to him was a payment for any claim that he might have to share in those contingent fees."

It was after the firm of Malkan & Ellner was established that the Laskey and Austin suits were filed in the Southern District of New York on November 6, 1954. The defendants in both suits are substantially the same corporations—some 58 in number and all in the motion picture industry. Many of the defendants in these suits were clients of Sargoy & Stein, when Isacson was there employed and were also defendants in the Fisher suit. Both the Laskey and Austin suits are 35mm. anti-trust actions against distributors. The claims alleged in both suits are in substance predicated upon the same restraints as alleged in the Fisher suit.

The Laskey matter came to Malkan & Isacson through Isacson; a suit was filed in 1953 in the Western District of Pennsylvania by Malkan & Isacson; the same issues are there presented as in the suit in the Southern District of New York; this prior suit in Pennsylvania is still pending. It was in the New York suit that the order of disqualification to which one of the appeals has been filed was made.

I agree with Judge Dawson's observation that—

> "As Mr. Malkan, as well as Mr. Isacson, was disqualified from handling that case at a time when it first came to their office, this disqualification cannot be cured by the dissolution of the partnership. Once the attorney was disqualified from handling the case, he remains disqualified."

I am unable to follow the removal of this disqualification from Malkan and his new associate Ellner and the approval of the continuance of their employment in the Austin suit.

Isacson was disqualified because of his former engagement by a law firm representing the defendant corporations. While so employed he occupied a position of great moral trust and confidence. From his confidential position there attached to him an obligation which was voluntarily assumed by all who later joined with him in the practice of the law. It attached to Malkan if for no other reason than that he became a partner of Isacson and it attached to Ellner upon his association with Malkan.

Partners in a law firm do not dwell in cubicles; they all must observe and respect the confidence and trust a client has reposed in any one of them; they divide the fees and rewards of faithful service; they join in a common acceptance of responsibility to a client; they jointly and severally represent the clients; all are bound to each and every client of the firm by a relationship of trust and confidence, and are bound by such relationship which has at any time existed as to any former client of any one partner. It seems to me that to hold otherwise is to view the practice of the law as a business rather than as a profession. The principles to guide us in fixing the extent of professional

obligations of the Bar are not to be looked for in the market place.

As to the Austin suit Judge Dawson found that it first came to Malkan after the partnership with Isacson had been dissolved and that Isacson had not had any connection with that case. He held that Malkan, Ellner and Malkan & Ellner were qualified to represent the plaintiff, and wrote–

> "There has been no evidence presented that Mr. Malkan acquired such confidential information, and the burden would be upon the defendants to assert or offer proof that he had acquired such confidential information. This they have not done."

I do not agree that the burden is upon the defendants. It is far too great a task to place upon a former client seeking protection against disclosure of his confidences to require him to establish by proof that the confidence he placed in one partner has been disclosed to other partners. Assuming arguendo that such burden is upon the client, the record before us, while it contains no direct evidence of disclosure by Isacson to Malkan and subsequent disclosure by Malkan to Ellner, contains more than ample evidence to support the inference that such disclosure did in fact occur. Direct evidence would be well nigh impossible to obtain; the circumstances shown lead to one rational conclusion.

The defendants have the burden of establishing that a relationship of trust and confidence existed between them and the member of the Bar whom they seek to disqualify. This burden, they have concededly sustained as to Isacson by affirmative proof; Malkan and Ellner are bound by reason of the circumstances surrounding Malkan's association with Isacson and his subsequent association with

Ellner. The defendants further need only show that these attorneys who owe them loyalty and fidelity have undertaken to represent adverse parties in matters in which the confidences given are involved. This, the defendants have done.

The ethics of the situation are tersely expressed in the third paragraph of Canon 6 of the Canons of Professional Ethics of The American Bar Association, which reads—

> "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

It is by application of this principle that Malkan, Ellner and the firm of Malkan & Ellner are disqualified in the Laskey suit. That disqualification attached to Malkan, not only by reason of association as a partner with Isacson in the practice of the law, but also by reason of the confidence which partners place in one another and the joint obligation to the former clients of any partner of the firm. Ethical obligations place both Malkan and Ellner individually in the same moral position as Isacson.

I would reverse in Austin and enter an order of disqualification as in Laskey.

The economic hardship, if any there be, resulting to Malkan and Ellner, while not pertinent, seems far less than that imposed on the attorney in *Consolidated Theatres* v. *Warner Brothers,* 216 F. 2d 920, 926 (C. A. 2 1954). I have in reaching my decision disregarded the stipulation which was entered into in the Fisher suit.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of July one thousand nine hundred and fifty-five.

Present:

Hon. Charles E. Clark,
Chief Judge,

Hon. Harrie B. Chase,
Circuit Judge,

Hon. Sylvester J. Ryan,
District Judge.

Austin Theatres, Inc., *Plaintiff-Appellee,* *v.* Paramount Film Distributing Corp., *et al.*, *Defendant-Appellant.*	Civ. 96/334 335

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By Ralph C. Curcio
Deputy Clerk

A true Copy
/s/ A. Daniel Fusaro
Clerk
(SEAL)

End.